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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SHEILA F. BRANDE,	:	
	:	
Plaintiff and Respondent,	:	
	:	
vs.	:	
	:	
THE CITY OF TOOEELE, STATE OF UTAH,	:	
	:	No. 15139
Defendant and Appellant.	:	

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third
District Court for Tooele County
Hon. Peter F. Leary, Judge

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and Appellant.

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	1
ARGUMENT.....	5
POINT ONE:	
THE RULES OF CIVIL PROCEDURE GRANT THE DISTRICT COURT DISCRETION TO VACATE DEFAULT JUDGMENTS.....	5
POINT TWO:	
THE TRIAL COURT'S DISCRETIONARY DECISION SHOULD BE AFFIRMED UNLESS IT WAS SHOWN TO BE AN ARBITRARY AND CAPRICIOUS DISREGARD OF DISCRETION.....	6
POINT THREE:	
A REVIEW OF THE CASE LAW AND THE FACTS SHOW THAT THE COURT DID NOT ABUSE ITS DISCRETION.....	7
POINT FOUR:	
MISPLACING THE SUMMONS AND COMPLAINT BY DEFENDANT'S ATTORNEY'S EMPLOYEE AFTER BOTH DEFENDANT AND DEFENDANT'S ATTORNEY HAD SEEN COMPLAINT IS NOT INADVERTENCE OR EXCUSABLE NEGLECT.....	10
POINT FIVE:	
EQUITY DOES NOT REQUIRE THAT A DEFAULT JUDGMENT BE SET ASIDE UNLESS OTHER FACTORS ARE PRESENT.....	12
POINT SIX:	
EQUITY REQUIRES THAT THE PLAINTIFF IS ENTITLED TO THE RELIEF PROVIDED IN THE DEFAULT JUDGMENT....	13

CONCLUSION.....

CASES CITED

<u>Airkem Intermountain, Inc. v. Parker</u> , 30 U2d 65, 513 P.2d 429 (1973).....	5,7,
<u>American Savings And Loan Association v. Pierce</u> , 28 U2d 76, 498 P2d 648 (1972).....	
<u>Barber v. Calder</u> , 522 P.2d 700 (Utah, 1974).....	
<u>Boise Valley Traction Co. v. Boise City</u> , 214 P 1037 (Idaho, 1923).....	9,1
<u>Cobia v. Roy City</u> , 366 P.2d 986, (Utah, 1961).....	1
<u>Doyle v. Rice Ranch Company</u> , 81 P.2d 980 (Calif., 1938) ..	1
<u>Kennedy v. Meyer Co., Inc.</u> , 218 Kan. 387, 543 P.2d 937 (1975).....	
<u>Kiesel And Co. v. Ogden City</u> , 30 P 758 (Utah, 1892)... ..	1
<u>Masters v. LeSeuer</u> , 13 U2d 293, 373 P.2d 573 (1962)...6,9,1	
<u>Mayhew v. Standard Gilsonite Co.</u> , 14 U2d 52, 376 P.2d 951 (1962).....	
<u>Montez v. Tonkawa Village Apartments</u> , 215 Kan. 59, 523 P.2d 351 (1974).....	
<u>Moqui, Inc. v. Ambrose And Rosenfield And Co.</u> , 21 Ariz. App. 565, 521 P.2d 1143 (1974).....	
<u>Pacer Sport And Cycle, Inc., v. Meyers</u> , 534 P.2d 616, (Utah, 1975).....	6,9,
<u>Phillips v. Findly</u> , 19 Ariz. App. 348, 507 P.2d 687 (1973).....	
<u>Thompson Ditch Co. v. Jackson</u> , 29 U2d 259, 508 P.2d 528, (1973).....	
<u>Utah State Employees Credit Union v. Riding</u> , 24 U2d 211, 469 P.2d 1, (1970).....	
<u>Warren v. Dixon Ranch Co.</u> , 260 P.2d 741, (Utah, 1953)..7,3	

STATUTES CITED

Utah Code Annotated 10-7-7 (1953 as amended).....	13
Utah Code Annotated 10-7-8 (1953 as amended).....	13
Utah Code Annotated 10-7-9 (1953 as amended).....	13
Utah Code Annotated 10-7-14.2 (1953 as amended).....	13
Utah Code Annotated 10-8-38 (1953 as amended).....	13
Utah Rules Of Civil Procedure, Rule 55(c).....	5,7
Utah Rules Of Civil Procedure, Rule 60(b).....	5,7

OTHER REFERENCES

49 C.J.S. § 334, N 6(a).....	11
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STATEMENT OF THE KIND OF CASE

This is an action for injuries to property arising from an obstruction in the City's sewer line which caused the sewer to back up repeatedly into Plaintiff's home.

DISPOSITION IN LOWER COURT

A Default Judgment was entered against the Defendant. The Defendant subsequently filed a Motion To Set Aside the Judgment, an Affidavit, and a Memorandum of Authorities. The district court, after hearing oral argument by both parties, denied the Motion To Set Aside Default Judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the District Court's Order dismissing Defendant's Motion To Set Aside Default Judgment affirmed.

STATEMENT OF FACTS

NEGOTIATION BACKGROUND

As mentioned on pages 7 and 8 of the transcript of the hearing, there were negotiations before the suit was filed. A more detailed account of the negotiations shows the following:

On March 30, 1976, the Plaintiff first contacted her attorney concerning the damage done to her home by sewage backflow. More accurate information was requested, research was done, and on May 28, 1976, the Tooele City Council and Mayor Douglas Sagers were informed by written statement of the claim asserted by the Plaintiff. This two-page letter outlined the dates when the sewer had backflowed into the Defendant's home. The backflows had actually started in January, 1975, and the final backflow occurred on December 26, 1975. The letter also itemized the Plaintiff's claim for damages. A copy of this letter was also mailed to the Defendant's attorney.

In correspondence dated August 13, 1977, from the Gulf Insurance Company, a claim adjuster requested information about Plaintiff's claim. On August 27, 1976, the information requested was supplied to the Gulf Insurance Company Group--including copies of cancelled checks issued by the Plaintiff to pay repairmen, etc. On October 6, 1976, Plaintiff's attorney contacted by letter the Gulf Insurance Group requesting a progress report. A copy of this letter was sent to the Defendant's attorney.

On the 12th of October, 1976, Plaintiff's attorney was informed by the adjuster for the Gulf Insurance Company that the reason for the delay was that they had not received some information from the Defendant. On October 14, 1976, Plaintiff

attorney was informed that the Gulf Insurance Company was referring this matter to the Commercial Standard Insurance Company of Fort Worth because the responsibilities for coverage should be vested in them. On October 14, 1976, notice of the Plaintiff's claim was sent to Crawford & Company, the new adjuster, along with copies of the information previously sent to the other adjuster. A copy of this letter was sent to Defendant's attorney.

On the 20th of October, 1976, the new adjuster asked for additional information, which was sent to them by letter dated October 21, 1976. On October 29, 1976, Crawford & Company said by a letter that the responsibilities for the coverage, if any, belonged with Gulf Insurance Company.

On November 11, 1976, Plaintiff's attorney notified Gulf Insurance Company of the decision of Crawford & Company. It was noted that if some response was not received by November 22, 1976, that legal action would have to be instituted against the City of Tooele. A copy of this letter was mailed to the Defendant's attorney.

On November 18, 1976, Gulf Insurance informed Plaintiff's attorney that they were denying the Plaintiff's claim for damages. After the refusal to pay the claim, the lawsuit was filed and the Mayor was served personally on January 24, 1977.

ADDITIONAL FACTUAL INFORMATION

The Plaintiff did inform the City of Tooele, on or about

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the 3rd day of June, 1975, about the sewer back-up. In the process the Plaintiff contacted personally Douglas Sagers, the Mayor; Dale Howard, the City Engineer; Keith Dymock, the Sewer Plant Superintendent; and Stephen Hilton, the Tooele County Sanitation Officer, telling each about the back-up; however, the Plaintiff never used the words "sewer lateral". At all times she referred to the "sewer line". [See Plaintiff's Complaint, paragraph 9]. Plaintiff agrees that the City couldn't find the Defendant's sewer line.

The Plaintiff then hired her own contractor, who finally found the obstruction and the cause of the obstruction, a broken section of sewer pipe. The broken pipe was located approximately 125 feet along the sewer line from Plaintiff's basement sewer drain in the street belonging to the Defendant named Isgreen Circle, and not the Plaintiff's property, as stated in Defendant's Brief.

The Plaintiff's attorney, after obtaining a Default Judgment on the 17th of February, 1977, gave notice to Defendant on the 24th of February, 1977, by written letter that a Default Judgment had been obtained and requested payment. The February 24, 1977, letter was delivered to the Defendant's attorney on March 4, 1977. [See paragraph 8 of Defendant's Affidavit].

The Plaintiff's attorney's last correspondence with Defendant's insurance carrier was the November 18, 1977, letter.

in which the carrier denied liability. After denial, Plaintiff had no further obligation to correspond with Defendant's insurance carrier--to do otherwise would be a violation of ethics.

ARGUMENT

POINT ONE

THE RULES OF CIVIL PROCEDURE GRANT THE DISTRICT COURT DISCRETION TO VACATE DEFAULT JUDGMENTS.

The Utah Rules of Civil Procedure, Rules 55(c) and 60(b), grant discretion to the trial court to set aside a Default Judgment for a number of different reasons which are specifically itemized. In order to vacate a Judgment the moving party must designate the exact rule upon which the relief is granted. The Defendant's Brief is silent as to which specific rule provides a basis on which the Judgment should be set aside.

This Court, in 1973, in the case of Airkem Intermountain, Inc. v. Parker, 30 U2d 65, 513 P.2d 429, held in affirming the decision to not set aside a default judgment that the general rule is that the decision as to whether or not the Defendant had an opportunity to present his case is to be made at the trial level, and that the Supreme Court won't reverse just because the Defendant's Motion To Set Aside could have been granted.

POINT TWO

THE TRIAL COURT'S DISCRETIONARY DECISION SHOULD BE AFFIRMED UNLESS IT WAS SHOWN TO BE AN ARBITRARY AND CAPRICIOUS DISREGARD OF DISCRETION.

In the case of Thompson Ditch Co. v. Jackson, 29 U2d 508 P.2d 528 (1973), this Court held that on appellate review the trial judge should be affirmed unless the decision is arbitrary and capricious to the point reflecting a clear abuse of discretion. The Defendant has not cited in his Brief any action of the District Court which was arbitrary or capricious. The cases cited by Defendant are well-known to the District Court. They were mentioned in Defendant's Memorandum of Authorities prior to the hearing on the Motion. These cases were also argued before the Court and still the Court refused in its discretion to grant the relief requested by the Defendant.

More recently this Court again subscribed to this view in the case of Pacer Sport & Cycle, Inc. v. Meyers, 534 P.2d 616, Utah (1975), as the Court said:

"The trial court has a discretion in determining whether or not a default judgment should be set aside, and we on appeal should not reverse its ruling except for abuse of discretion, to wit, that it is arbitrary, capricious, or not based on adequate findings of fact or on the law."

This Court also held, in Masters v. Leseuer, 13 U2d 293, 37 P.2d 573 (1962), that relief from a Default Judgment on grounds of inadvertence and excusable neglect is discretionary and

in the clear absence of a clear abuse of discretion, the trial court will not be reversed.

Thus, the Defendant has the burden to prove that there was a clear abuse of the trial court's discretion as it made judgments as to whether the Defendant has met the burden required by Rule 60(b) or 55, Utah Rules of Civil Procedure.

POINT THREE

A REVIEW OF THE CASE LAW AND THE FACTS SHOW THAT THE COURT DID NOT ABUSE ITS DISCRETION.

The Defendant, in its Brief and in its Memorandum of Authorities, has cited a number of cases dealing with Default Judgments. There are an equal number in which Judgments have been set aside and in which the Judgments have been affirmed. Common themes present in all cases are the questions of due diligence and control. The Defendants have had to consistently show that they have acted with due diligence, Warren v. Dixon Ranch Co., 260 P.2d 741 (1953) Utah, and the Airkem case, supra. In the Warren case the Defendants were required to show that they acted in due diligence in order to obtain favorable treatment.

In the present case, the Defendant's attorney said in his Affidavit, paragraph 8, that he was unaware of the judgment until informed by the Mayor, who showed him the letter sent to the Mayor by the Plaintiff's attorney. It is clear

that after he became aware of the Judgment he exercised due diligence, but before the Plaintiff informed the Mayor, neither the Defendant nor the Defendant's attorney had done anything to check on the progress of the lawsuit. In the same paragraph the Defendant's attorney stated:

"Because your affiant was not personally required to prepare an answer in the matter, and due to his heavy involvement in other city and private cases, he did not pursue the preparation of an answer further..."

When the Defendant presented the Summons and Complaint to its attorney, he was aware of the nature of the lawsuit and knew that the Defendant must answer the Complaint within 20 days or a Default Judgment would be taken. To simply assume that somebody else, even an insurance attorney, would answer for the Defendant does not show due diligence on the part of the Defendant or its attorney.

Another essential element that basically the courts decide in these cases is the element of control. If the Defendant has no control over the events because of lack of notice or for some other reason, the court then properly liberally interprets the rule and often grants an Order setting aside the judgment. Montez v. Tonkawa Village Apartments, 215 Kan. 59, 523 P.2d 351 (1974); Mogui Inc. v. Ambrose And Rosenfield And Co., 21 Ariz. App. 565, 521 P.2d 1143 (1974); Phillips v. Findly, 19 Ariz. App. 348, 507 P.2d 687 (1973); Kennedy v. Meyer Co., Inc., 218 Kan. 387, 543 P.2d 937 (1976).

P.2d 1 (1970); and Mayhew v. Standard Gilsonite Co., 14 U2d 52, 376 P.2d 951 (1962).

In the cases where Default Judgments have been affirmed, the Defendants had notice and, essentially, the control of their reasons for defaulting was placed squarely on the Defendants: Pacer, supra.; Airkem, supra.; Warren, Masters, supra.; and Boise Valley Traction Co. v. Boise City, 214 P 1037, Idaho (1923); Barber v. Calder, 522 P.2d 700 (1974); and American Savings And Loan Association v. Pierce, 28 U2d 76, 498 P.2d 648 (1972).

In the present case the elements of control are as follows: The City and its attorney are notified of a claim on May 28, 1976. The Defendant's attorney is given copies of Plaintiff's correspondence with insurance companies on October 6, October 14, and November 11 of 1976, plus Defendant's attorney had his own private communication with Defendant's insurance adjusters. On January 24, 1977, the Defendant is served when the Mayor is personally served with a copy of the Summons and Complaint. The Defendant immediately delivers the same to its attorney, who gives directions to his secretary to take care of the Complaint. Neither the Defendant nor its attorney take further action to actually notify their insurance adjuster, to request an extension of time, or to prepare an answer. All such courses of action which would have been proper are solely under the control of the Defendant and its attorney.

Thus, because the Defendant had control and did not exercise due diligence under the Utah case law, it was not an abuse of the court's discretion to refuse to set aside the Default Judgment.

POINT FOUR

MISPLACING THE SUMMONS AND COMPLAINT BY DEFENDANT'S ATTORNEY'S EMPLOYEE AFTER BOTH DEFENDANT AND DEFENDANT'S ATTORNEY HAD SEEN COMPLAINT IS NOT INADVERTENCE OR EXCUSABLE NEGLECT.

In an Idaho case that is directly in point with the present case, Boise Valley Tractor Co. v. Boise City, 214 P. 1037 (1923), the Court ruled that the confusion of papers or the mistake and inadvertence of a clerk in placing the Summons and Complaint in a file where the Mayor did not see them would not constitute such a mistake, inadvertence, surprise, or excusable neglect, as contemplated by the statute in order to obtain relief from judgment.

The facts in Boise showed that the Mayor had been served personally, that the Complaint was filed in a Public Utilities Commission file with the name of the same company and that the error was not discovered until the Plaintiff made demand for payment. These facts are the same, but in the present case, the Mayor gave the documents to the City Attorney, who gave them to his secretary, who then filed the

Complaint and Summons with the rest of the investigative material already compiled for this case by the Defendant's attorney, paragraph 7 of Defendant's Affidavit.

This Court has also ruled in Masters, supra., that ordinary memory lapse accompanied and facilitated by a clerical error in filing papers plus additional items was not excusable neglect. In the Pacer case, this Court also held that inaction or failure to take action on the part of the Defendant does not rise to the level of excusable neglect. The failure of a secretary to timely mail an Amended Complaint also did not rise to the level of excusable neglect, Doyle v. Rice Ranch Company, 81 P.2d 980 (California, 1938).

It is a general rule of law, as cited in 49 CJS § 334, paragraph 16(a), that the law does not look with favor, however, in setting aside defaults resulting from inexcusable neglect, inadvertence, surprise, or neglect of attorneys in the performance of their duties to their clients. Such failure on the part of the attorney ordinarily is imputable to their client, unless their default can be excused as being the result of accident or surprise, that which ordinary prudence on their part could have been avoided.

The real neglect or advertence in the present case occurred in the Defendant's attorney's office; however, this mistake should not be excusable. The next neglect was on the part of the Mayor, who was by the Plaintiff notified about

the problem in 1975, who received notice of Plaintiff's claim in May, 1976, who was served personally on January 24, 1977, and who turned the Complaint over to his attorney soon thereafter, and then took no further action until informed by Plaintiff's attorney about the Judgment. As Mayor and Chief Executive Officer of Tooele, the Mayor has a supervisory role of all City employees, including the City Attorney and his secretary. Thus, the failure to properly file by both the Defendant and its attorney is submitted as not rising to the level of excusable neglect.

POINT FIVE

EQUITY DOES NOT REQUIRE THAT A DEFAULT JUDGMENT BE SET ASIDE UNLESS OTHER FACTORS ARE PRESENT.

The Defendant has relied on equity to set aside the Default Judgment in both its Brief and Memorandum. A close review of the case law, however, indicates that additional factors have always been present when the Court has set aside a judgment for equitable purposes: In the Warren case, supra, the need for equity and to avoid harsh treatment were necessary; however, the Defendant must show due diligence before being able to obtain the more favorable equitable treatment. The Court in the case said:

"Although a judgment may be erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that the

negligence of the attorney, agent, or trustee or other representative of the present complainant prevented a fair trial."

Sufficient evidence was available at the hearing for the lower court to be fully advised as to the Defendant's alleged inequities that should have compelled the Court to grant relief, and yet the Court was not impressed that any alleged inequities should have been remedied by setting aside the judgment.

POINT SIX

EQUITY REQUIRES THAT THE PLAINTIFF IS ENTITLED TO THE RELIEF PROVIDED IN THE DEFAULT JUDGMENT.

Since 1898, the legislature has authorized cities to construct and operate sewer systems, U.C.A. 10-8-38, 1953 as amended, and also given cities the authority to tax to pay for the operation of such systems, U.C.A. 10-7-14 (2). Further, the legislature has authorized cities to bond for treatment of the sewer and to even tax to retire the bonded indebtedness, U.C.A. 10-7-7, 8, & 9. Thus, the responsibility for the operation of a sewer has been vested by the legislature with the city rather than with the citizens of the city as a matter of public policy.

Before statehood in 1892, the Utah Supreme Court held, in the case of Kiesel & Co. v. Ogden City, 30 P 758, where

sewers have been solely controlled by municipalities, that the city is liable for the direct inundations of property with sewage where the sewer is negligently maintained by the City. In the Cobia v. Roy City case, 366 P.2d 986, (Utah, 1961), the Court held that the operation of a sewer system was a governmental function. The Plaintiff has complied with the Utah Intergovernmental Immunity Act, so that the issues of negligence can properly be raised.

The break occurred 125 feet from the Plaintiff's basement drain, the sewer line went from the Plaintiff's house directly on to the neighbors' property, and then angled from the neighbors' property to a bigger sewer line on Isgreen Circle. The break in the pipe occurred in the City street. [See paragraphs 10 and 11 of Plaintiff's Complaint]. The Plaintiff had no idea where the sewer line was, and this should have been known by the City.

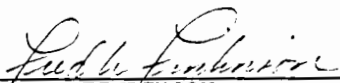
The City was collecting a service fee from Plaintiff for the collection of sewage. The City, therefore, had a duty to insure that the Plaintiff would not be damaged from sewage back flow. Since the break occurred in the City street there was no way for the Plaintiff to have control over the sewer line. The City had the capacity to control and the responsibility to maintain its sewage system in such a manner so that the Plaintiff would not be damaged by sewage back flow. Since the damage occurred, and the Plaintiff had no control

over the circumstances which caused the pipe under the road to break, equity demands that the Plaintiff have a Judgment for the damages.

CONCLUSION

The decision to grant relief is vested to the trial court. It is discretionary and should be affirmed unless it is an arbitrary and capricious disregard of this discretion. Adequate information was available to the Court prior to reaching its decision. In light of the case law and the facts of this present case, the trial court did not abuse its discretion by refusing to vacate Plaintiff's Judgment. The neglect and inadvertence of this case does not rise to the level of excusable neglect. Equity does not require a Judgment be set aside just because the Order could have been granted. For these reasons, the Order of the District Court should be approved.

Respectfully submitted,


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MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Respondent's Brief were mailed, postage prepaid, this 9th day of August, 1977, to Alan K. Jeppesen, City Attorney, Tooele City Corporation, 90 North Main Street, Tooele, Utah, 84074.

A handwritten signature in cursive script, appearing to read "Fred W. Linder", is written over a horizontal line.